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PERWIRA HABIB BANK (M) BHD.

v.

SYKT. JOHOR TENGGARA SDN. BHD. & ORS.

b

HIGH COURT MALAYA, KUALA LUMPUR

GUNN CHIT TUAN J

[SUIT NO. C23-2306-86]

4 MAY 1989

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CIVIL PROCEDURE: Counter claim by 1st defendant against plaintiff - Appeal against decision of Senior Assistant Registrar allowing summary judgment under O. 14 of the Rules of the High Court 1980 - Application for stay of execution pending outcome of 1st defendant's counter claim - Application for further arguments in open Court.

The defendants appealed against the decision of the Senior Assistant Registrar who on 12 October 1987 ordered that the plaintiff be given leave to enter summary judgment against the defendants pursuant to O. 14 of the Rules of the High Court 1980.

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At the hearing of the appeal to Judge in chambers the Senior Assistant Registrar's decision was varied by varying the interest from 16.5% per annum to 8% per annum but the rest of decision was upheld. However a stay of execution against all the defendants pending the disposal of the 1st defendant's counter claim was granted. The plaintiffs applied for adjournment to open Court under O. 56 r. 2 for further arguments.

Held:*e*

[1] Although the guarantee signed by the 2nd to 8th defendants did not provide that payment should be free from set off or counter claim the Courts of this country should take into account the commercial purpose of guarantees which is for the creditors to be paid early when the principal debtors are unable or unwilling to do so. Accordingly the 2nd to 8th defendants could not avail themselves of the counter claim of the 1st defendant.

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[2] The order of stay of execution against the 2nd to 8th defendants was set aside and ½ costs to be paid by defendants to the plaintiff.

Cases referred to:

P.H. Grace Pte. Ltd & Ors. v. American Express International Banking Corporation [1987] 1 MLJ 437

Hyundai Shipbuilding & Heavy Industries Co. Ltd. v. Pournaras [1978] 2 Lloyd's LR 502

Hyundai Heavy Industries Co. Ltd v. Papadopoulos [1980] 1 WLR 1129

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Lep Air Services Ltd. v. Rolloswin Investment Ltd. [1973] AC 331

Legislation referred to:

Rules of the High Court 1980, O. 14 r. 1, O. 56 r. 2

For the plaintiff/respondent - Siew Yew Ming; M/s. Soo Thien Ming & Shahrizat

For the defendants/appellants - Choo Keng Hee; M/s. K.H. Choo & Co.

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JUDGMENT

Gunn Chit Tuan J:

This is an appeal by the abovenamed defendants against that part of my decision whereby I set aside my order made in chambers for a stay of execution against the 2nd to the 8th defendants pending determination of the first defendant's counterclaim against the plaintiff.

All the defendants had appealed to the Judge in chambers against the decision of the learned Registrar who on 12 October 1987, had ordered that the plaintiff be allowed to sign final judgment against them pursuant to O. 14 r. 1 of the Rules of the High Court 1980, and that the costs of the application be borne and paid by the defendants.

After hearing arguments in chambers on 12 May 1988, I allowed the appeal in part by varying the rate of interest awarded by the Registrar from 16.5 per cent per annum to 8 percent per annum from 12 August 1987 to the date of realisation, but upheld the Registrar's decision to enter judgment in favour of the plaintiff. I also ordered that there be a stay of execution against all the defendants pending disposal of the first defendant's counterclaim against the plaintiff.

The plaintiff was dissatisfied with the order made by me in chambers and applied for adjournment to open Court for further arguments, but the abovenamed defendants did not so apply under O. 56 r. 2 of the Rules of the High Court 1980.

On 28 February 1989, Mr. Siew Yew Ming, Counsel for the plaintiff, submitted that there should be no stay of the execution of the judgment pending disposal of the first defendant's counterclaim unless there was a plausible counterclaim which was not frivolous or vexatious. He submitted that the first defendant had not made out a plausible counterclaim as its claim for misrepresentation was without reasonable chance of success.

As against the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th defendants Counsel for the plaintiff submitted that they were not entitled to avail themselves of the first defendant's counterclaim whatever its merits. He referred to *P.H. Grace Pte. Ltd. & Ors. v. American Express International Banking Corporation* [1987] 1 MLJ 437 and stated that the material facts of that case were similar to the present case and the Court of Appeal of Singapore had ruled that although at common law guarantors were entitled to avail themselves of the counterclaim of the principal debtor, yet in that case there should be no stay of execution on the judgment against the guarantors. He pointed out that the Singapore Court of Appeal had ruled that as the whole purpose of a guarantee was to secure quick payment in the event of default by the principal debtor, it would be inconsistent with commercial realities to stay execution of judgment obtained against guarantors of a loan pending disposal of a counterclaim set up by the principal debtor. Counsel also pointed out that Thean J in that case had quoted with approval the following passage from the English Court of Appeal decision in *Continental Illinois National Bank and Trust Company of Chicago v. Papanicolaou* (The Times, 15 July 1986):

Guarantees such as this are the equivalent of letters of credit and only in exceptional circumstances should the Court exercise its powers to stay execution. The fact that a counterclaim which was likely to succeed existed would not by itself be enough... It might be that the existence of such a counterclaim coupled with cogent evidence that the bank would, if paid, be unable to meet a judgment on the counterclaim would suffice, but nothing of that nature arises here.

a In so far as the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th defendants were concerned, it was the contention of Mr. Choo, Counsel for the abovenamed defendants, that at common law they were entitled to avail themselves of the counterclaim or set off of the first defendant. He referred to the following passage in para. 190 of *Halsbury's Laws of England* (4th Edn.):

b On being sued by the creditor for payment of the debt guaranteed, a surety may avail himself of any right of set off or counterclaim which the principal debtor possesses against the creditor, and any division of the High Court can give effect to it or to any equitable defence raised.

which was also referred to by Roskill LJ (as he then was) in *Hyundai Shipbuilding & Heavy Industries Co. Ltd. v. Pournaras* [1978] 2 Lloyd's LR 502 when he dealt with the common law right of a guarantor to avail himself of a right of a set off which a principal debtor has against the creditor. Mr. Choo contended that whether the guarantors were entitled to the benefit to the set off or counterclaim (if any) so as to avoid paying the sums claimed against them in these proceedings depended on the construction of the terms of the guarantee. He pointed out that the guarantee in this case did not provide that payment should be made free of any set off or counterclaim and therefore there should be a stay of execution on the judgment against the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th defendants.

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d It must however be pointed out that although Roskill LJ referred to the above quoted passage from *Halsbury's Laws of England*, the U.K. Court of Appeal in *Hyundai Shipbuilding & Heavy Industries Co. Ltd. v. Pournaras* [1978] 2 Lloyd's Law Report 502, 506, 508 in its judgment delivered by Roskill LJ himself held that the right way of construing the guarantee was to construe it as a whole against the "factual matrix of the background" and that factual matrix of the background was plain and not susceptible of any controversy; the commercial purport, obvious intent and true construction of the guarantee was such that the defendants

e contention that all the guarantee did was to bind the guarantor to ensure performance by the buyer of the buyer's obligations, was really not arguable: and the true meaning was that if the buyer did not pay in time the guarantor would pay and the learned Judge was right in the view he took. The U.K. Court of Appeal also held that the defendants' several liabilities under the respective guarantees remained wholly unaffected and although the guarantees might have been more clearly drafted, their avowed object was to enable the plaintiffs to recover from the defendants the amount due irrespective of the position between the plaintiff

f and the buyers. "Otherwise, if one gave effect to this argument based on the principles set out in the passage in *Halsbury & Rowlatt*, the commercial utility of this particular form of guarantee would be wholly nullified" (per Roskill LJ) . In effect the English Court of Appeal held that the defendants as guarantors were not entitled to the benefit of the set off so as to avoid paying the sums claimed against them in the proceedings. The House of Lords in *Hyundai Heavy Industries Co. Ltd. v. Papadopoulos* [1980] 1 WLR 1129,1137F, 1142H, 1144B, 1144C, 1153A & B followed the decision in the *Pournaras* [1978] 2 Lloyd's Law Report 502, 506, 508 holding that the cancellation of a contract did not deprive the builders, as creditors, of their accrued rights to payments as against the guarantors.

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h The Singapore Court of Appeal in *P.H. Grace Pte. Ltd. v. American Express International Banking Corporation* [1987] 1 MLJ 437, 440, 441, 442, also pointed out that the English Court of Appeal in *Continental Illinois National Bank and Trust Company of Chicago v. Papanicolaou* (The Times, 15 July 1986) had on appeal removed a stay of execution granted by the Court below, holding that the commercial purpose of the transaction was that upon default by the borrower the bank should be paid quickly and that the natural meaning of the

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provision of the guarantee was that all set offs and counterclaims were to be excluded. Parker LJ in that case had equated the guarantee with a bank guarantee. Reference was also made by the Singapore Court of Appeal to the following passage in the judgment of Parker LJ:

... Irrevocable letters of credit and bank guarantees given in circumstances such that they are the equivalent of an irrevocable letter of credit have been said to be the life blood of commerce. Thrombosis will occur if, unless fraud is involved, the Courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand.

We can see no relevant distinction between the guarantee in that case and the guarantees presently under consideration. The purpose of both was to ensure immediate payment if the principal debtor did not pay. Indeed the present cases make it the more necessary that the Court should not interfere, for here the parties have specifically provided both in the loan agreement and the guarantees that payment should be made free of any set-off or counterclaim. It would defeat the whole commercial purpose of the transaction, would be out of touch with business realities and would keep the bank waiting for a payment, which both the borrowers and the guarantors intended that it should have, whilst protracted proceedings on the alleged counterclaims were litigated. We do not doubt that the Court has a discretion to grant a stay but it should in our view be “rarely if ever” exercised, as Lord Dilhorne said in relation to claim on bills of exchange.

The Singapore Court of Appeal also pointed out in the case before them that there was no clause specifically providing that the payment should be made free of any set off or counterclaim but held that if a stay were to be granted it would in their view, make nonsense of the “whole commercial purpose of suretyship” and that “you would lose your guarantor at the very moment you most need him”) per Lord Simon in *Lep Air Services Ltd. v. Rolloswin Investment Ltd.* [1973] AC 331, 355).

Similarly, in this case it is true that the guarantee did not provide that payment should be made free of any set off or counterclaim. But it was not contended by the defence that the amount for which summary judgment was granted was not due, and I considered that Courts in this country hearing commercial cases ought to follow the trend of authorities in the appellate tribunals of other Commonwealth countries such as the United Kingdom and the Republic of Singapore and recognise business realities by taking notice of the commercial purpose of guarantees, the purport, utility and obvious intent of which are to ensure that creditors would be paid early by guarantors when the principal debtors are unable or unwilling to do so. I therefore confirmed my decision made in chambers on 12 May 1988, but set aside the order of stay against the 2nd to the 8th defendants. I also ordered that ½ the costs of further arguments be paid by the defendants to the plaintiff.

Also found at [1989] 2 CLJ 470

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